

REDACTED TRIAL BRIEF

Debra I. Grassgreen (CA Bar No. 169978)
Miriam Manning (CA Bar No. 178584)
PACHULSKI STANG ZIEHL & JONES LLP
One Market Plaza, Spear Tower
40th Floor, Suite 4000
San Francisco, CA 94111
Telephone: (415) 263-7000
Facsimile: (415) 263-7010
E-mail: dgrassgreen@pszjlaw.com
mmanning@pszjlaw.com

David J. Bradford (admitted *pro hac vice*)
Terri L. Mascherin (admitted *pro hac vice*)
Catherine Steege (admitted *pro hac vice*)
Katharine R. McLaughlin (admitted *pro hac vice*)
JENNER & BLOCK LLP
353 N. Clark St.
Chicago, IL 60654
Telephone: (312) 222-9350
E-mail: dbradford@jenner.com
tmascherin@jenner.com
csteegen@jenner.com
kmclaughlin@jenner.com

Counsel for Uber Technologies, Inc.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

ANTHONY SCOTT LEVANDOWSKI,

Debtor.

ANTHONY SCOTT LEVANDOWSKI, an
individual,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.

Defendant.

Case No. 20-30242 (HLB)

Chapter 11

Adv. Pro. No. 20-03050 (HLB)

**UBER TECHNOLOGIES, INC.'S TRIAL
BRIEF**

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
SUMMARY OF FACTS TO BE PROVEN AT TRIAL.....	2
A. The Operative Contract—The April 16, 2016 Indemnification Agreement.....	2
B. The Allegedly Indemnified Claim—The Arbitration Panel’s Award.....	3
1. The “Tyto Misconduct.”	4
2. The “Otto Misconduct.”.....	5
C. Evidence Establishing That Levandowski Is Not Entitled To Indemnification For The Arbitration Award.	5
1. Levandowski Lied To Stroz, Making Any Claim Based On His Tyto Misconduct An Excluded Claim.	5
2. After The Agreement Was Signed, Levandowski Secretly Caused Google IP To Be Transferred To Uber, Thereby Committing Post- Signing Bad Acts And Voiding The Agreement.	7
a. The Waymo Lawsuit Is A “Former Employer Claim.”	7
b. Levandowski’s Transfer Of The Planner Code.	8
c. Levandowski’s Transfer Of Confidential Google Information Related To LiDAR Technology.....	9
D. Levandowski’s Alleged Damages.....	9
E. Uber’s Proof Of Claim.....	11
LEGAL THEORIES ON WHICH UBER RELIES.....	12
I. The Agreement Is Void.....	13
A. Levandowski’s Multiple Post-Signing Bad Acts (Affirmative Defense 4 and Counterclaim III).	13
B. Levandowski’s Unclean Hands (Affirmative Defense 8).....	14
C. Levandowski’s “Knowingly Wrongful Conduct” Precludes Indemnification (Affirmative Defense 3).....	16
D. Public Policy And The Agreement Bar Indemnification For A Disgorgement Award (Affirmative Defenses 1 and 2, Counterclaim 1).....	18

1	II.	Most Of The Award Is For An Excluded Claim, For Which Uber Has No Obligation	
2		to Provide Indemnity (Affirmative Defenses 5 and 9 and Counterclaim IV).....	19
3	III.	Any Indemnification That The Court Awards To Levandowski Should Be Less Than	
4		\$5 Million.....	20
5	IV.	Levandowski Owes Uber Over \$270 Million In Fraud Damages That May Be Setoff	
6		Against Any Judgment (Affirmative Defense 10, Counterclaim VI).	24
7	V.	Uber’s Proof of Claim Should Be Allowed And Setoff Against Any Judgment (Count	
8		X, Affirmative Defense 10, Counterclaims VII, IX, X).	24
9		CONCLUSION.....	25
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

TABLE OF AUTHORITIES

Page(s)

Cases

<i>All. Mortg. Co. v. Rothwell</i> , 10 Cal. 4th 1226 (1995)	24
<i>Am. Master Lease LLC v. Idanta Partners, Ltd.</i> , 225 Cal App. 4th 1451 (2014)	23
<i>Bank of the West v. Superior Court</i> , 2 Cal. 4th 1254 (1992)	18, 19
<i>Bell v. Feibush</i> , 212 Cal. App. 4th 1041 (2013)	18
<i>In re Branford Partners, LLC</i> , No. SV 06-12551-KT, 2008 WL 8448329 (B.A.P. 9th Cir. Oct. 24, 2008)	12
<i>Cleghorn Bar Enters. v. Garlock</i> , No. A114398, 2008 WL 77584 (Cal. Ct. App. Jan. 8, 2008)	3
<i>CTC Real Estate Servs. v. Lepe</i> , 140 Cal. App. 4th 856 (2006)	23
<i>Cty. of San Bernardino v. Walsh</i> , 158 Cal. App. 4th 533 (2007)	23
<i>People ex rel. Dep't of Transp. v. Superior Court</i> , 26 Cal. 3d 744 (1980)	24
<i>DeRosa v. Transamerica Title Ins. Co.</i> , 213 Cal. App. 3d 1390 (1989)	15
<i>Federal Trade Commission v. Lucaslaw Ctr., Inc.</i> , No. SACV 09-0770 DOC (ANX), 2010 WL 11506885 (C.D. Cal. June 3, 2010)	19
<i>Federal Trade Commission v. Neovi, Inc.</i> , No. 06-CV-1952 JLS (JMA), 2009 WL 10672945 (S.D. Cal. May 18, 2009)	15
<i>Fladeboe v. Am. Isuzu Motors Inc.</i> , 150 Cal. App. 4th 42 (2007)	15
<i>In re Gnadt</i> , No. 11-10378-BFK, 2015 WL 2194475 (Bankr. E.D. Va. May 7, 2015)	21
<i>Hamilton v. Elite of L.A., Inc. (In re Hamilton)</i> , 584 B.R. 310 (B.A.P. 9th Cir. 2018)	24

1	<i>Houge v. Ford,</i>	
2	44 Cal. 2d 706 (1955)	20
3	<i>Labor Comm’r v. Ramirez (In re Ramirez),</i>	
4	556 B.R. 446 (Bankr. N.D. Cal. 2016)	24
5	<i>Lemat Corp. v. Am. Basketball Ass’n,</i>	
6	51 Cal. App. 3d 267 (1975)	17
7	<i>Level 3 Commc’ns, Inc. v. Fed. Ins. Co.,</i>	
8	272 F.3d 908 (7th Cir. 2001)	19
9	<i>Mancinas v. Pollard,</i>	
10	No. 18-cv-06235-YGR PR, 2020 WL 43266 (N.D. Cal. Jan. 3, 2020)	18
11	<i>Meissner v. Paulson,</i>	
12	212 Cal. App. 3d 785 (1989)	16, 17
13	<i>Meister v. Mensinger,</i>	
14	230 Cal. App. 4th 381 (2014)	23
15	<i>Parks v. Dittmar (In re Dittmar),</i>	
16	618 F.3d 1199 (10th Cir. 2010)	21
17	<i>People v. Andrews,</i>	
18	165 Cal. App. 2d 626 (1958)	17
19	<i>People v. Mahdavi,</i>	
20	No. G033693, 2006 WL 711284 (Cal. Ct. App. Mar. 21, 2006)	17
21	<i>People v. McCarthy,</i>	
22	244 Cal. App. 4th 1096 (2016)	18
23	<i>Pond v. Ins. Co. of N. Am.,</i>	
24	151 Cal. App. 3d 280 (1984)	15
25	<i>Prince v. Pac. Gas & Elec. Co.,</i>	
26	45 Cal. 4th 1151 (2009)	14
27	<i>Rau v. Ryerson (In re Ryerson),</i>	
28	739 F.2d 1423 (9th Cir. 1984)	21
	<i>Res-Care Inc. v. Roto-Rooter Servs. Co.,</i>	
	753 F. Supp. 2d 970 (N.D. Cal. 2010)	24, 25
	<i>Sedima, S.P.R.L. v. Imrex Co., Inc.,</i>	
	473 U.S. 479 (1985)	18
	<i>Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp.,</i>	
	255 Cal. App. 2d 300 (1967)	12

1	<i>Unilogic, Inc. v. Burroughs Corp.</i> ,	
2	10 Cal. App. 4th 612 (1992)	15, 16
3	<i>United States v. Levandowski</i> ,	
4	3:19-cr-00377-WHA, Dkt. 87	12
5	<i>United States. v. Levandowski</i> ,	
6	No. CR-00377 WHA	1, 2
7	<i>Uzyel v. Kadisha</i> ,	
8	188 Cal. App. 4th 866 (2010)	23
9	<i>Valdez v. Superior Court of San Bernardino Cty.</i> ,	
10	No. E070656, 2019 WL 1236932 (Cal. Ct. App. Mar. 19, 2019)	20
11	<i>Valley Crest Landscape Dev., Inc. v. Mission Pools of Escondido, Inc.</i> ,	
12	238 Cal. App. 4th 468 (2015)	12
13	<i>Waymo LLC v. Uber Techs., Inc.</i> ,	
14	Case No. 3:17-cv-00939-WHA, Dkt. 2219	12
15	Statutes	
16	11 U.S.C. § 502(b)(2)	10
17	11 U.S.C. § 523	24, 25
18	18 U.S.C. § 1832	1
19	Cal. Civ. Code § 3422	12
20	Cal. Civ. Code § 3423	12
21	Cal. Civ. Code § 2773	16, 17
22	Cal. Penal Code § 487(a)	17
23	Cal. Penal Code § 186.22(a)	18
24	Cal. Penal Code § 484(a)	17
25	Other Authorities	
26	Restatement (Second) of Agency § 403	23
27		
28		

1 Anthony Levandowski was convicted and sentenced to federal prison for a felonious scheme
2 that had at least two victims: Uber Technologies, Inc. (“**Uber**”) and his former employer, Google,
3 LLC (“**Google**”). Levandowski engaged in a theft of Google’s autonomous vehicle trade secrets and
4 secretly formed, funded, and operated a competing autonomous vehicle laser business, Tyto LiDAR,
5 LLC (“**Tyto**”), during the last four years he was employed by Google.

6 Shortly after he left Google, Levandowski persuaded Uber to purchase a company that he
7 formed called Ottomotto LLC (“**Otto**”). During those negotiations, Levandowski asked for
8 indemnification, explaining that Google was litigious and might sue him out of spite. Uber agreed to
9 do so, but conditioned the indemnity on, among other things, Levandowski not having engaged in any
10 undisclosed misconduct while at Google and on his not taking or using any Google confidential
11 information. Instead of telling Uber the truth, Levandowski falsely represented that he had not
12 improperly taken any Google trade secrets and that he had no competing side businesses while at
13 Google. As a result of those fraudulent representations and Levandowski’s criminal trade secret theft,
14 Uber was required to pay Google consideration worth \$250 million to settle Google’s claims that
15 Levandowski had used the stolen trade secrets after joining Uber.

16 Levandowski’s criminal misconduct is an adjudicated fact. On August 15, 2019, at Google’s
17 urging, Levandowski was indicted on 33 counts of theft and attempted theft of trade secrets. The
18 indictment alleged that Levandowski downloaded documents from Google’s servers intending to use
19 those documents “to the economic benefit” of an entity other than Google. This directly contradicted
20 what Levandowski had repeatedly told Uber.

21 On March 19, 2020, Levandowski pled guilty to one count of theft and attempted theft of trade
22 secrets in violation of 18 U.S.C. § 1832(a)(1), (2), (3) & (4). (Plea Agreement ¶ 1, *United States. v.*
23 *Levandowski*, No. 3:19-CR-00377-WHA (N.D. Cal. Mar. 19, 2020), ECF No. 77.) Levandowski
24 admitted under oath in the plea agreement and before Judge Alsup that he downloaded a Google trade
25 secret file “with the intent to convert [it] to the economic benefit of someone other than the owner. In
26 particular, I intended to use the Chauffeur Tracking Document to benefit myself and Uber.” (*Id.* ¶ 2.)

27 As this Court has noted, that admission is the “smoking gun” that proves “that Mr.
28 Levandowski fraudulently concealed his true intent in obtaining and possessing that information: to

1 use it for his and Uber’s benefit at Google’s expense.” [Dkt. 344 at 57.] In accepting his guilty plea,
2 Judge Alsup commented, “This was the biggest trade secret crime I have ever seen [T]here’s no
3 doubt in my mind, the reason he stole [the 14,000 files] on December 11th, 2015 was to have [them]
4 at the ready in case he needed [them] when he landed on his feet outside of Waymo.” (Tr. of
5 Proceedings at 72-73, *United States v. Levandowski* (N.D. Cal. Aug. 4, 2020), ECF No. 102.) But for
6 a last-minute pardon from former President Trump, Levandowski would be in federal prison today.

7 Levandowski now seeks to compound the damage he inflicted on Uber by seeking to force
8 Uber to pay Google *a second time* for his own wrongful conduct. At trial, Levandowski will claim that
9 he is entitled to be indemnified against Google’s \$179 million judgment ordering him to disgorge his
10 entire \$126 million bonus (plus interest). In other words, Levandowski—who reported approximately
11 \$60 million in assets on his bankruptcy schedules and also deposited an additional \$7 million into a
12 spendthrift trust for himself (in total, roughly the amount of compensation he received from Google
13 after income taxes—seeks to retain the compensation he never should have received in the first place
14 and foist liability for all of his misconduct onto Uber. However, as set forth herein, neither the facts
15 nor the law supports a recovery on Levandowski’s two remaining contract claims (Counts II and III).
16 Uber will also establish at trial that its proof of claim, which seeks recovery of all of the amounts it
17 was forced to pay on account of Levandowski’s wrongful conduct, should be allowed (Count X) and
18 that its claim should be found non-dischargeable (Counterclaims VI, VII, IX and X).

19 SUMMARY OF FACTS TO BE PROVEN AT TRIAL

20 A. The Operative Contract—The April 16, 2016 Indemnification Agreement.

21 On April 16, 2016, as part of Uber’s agreement to acquire Otto, Uber, Levandowski, and other
22 Otto employees entered into the indemnification agreement (the “**Agreement**”) that is the subject of
23 this adversary proceeding. Contrary to Levandowski’s arguments, the Agreement was not intended to
24 be a get-out-of-jail-free card for past misconduct or a license to harm Google in the future. Instead,
25 before entering into the Agreement, Uber required Levandowski to certify he had not committed any
26 undisclosed pre-signing bad acts, to undergo a confirmatory due diligence review conducted by an
27 independent firm jointly retained by Uber and Otto, and to promise he would not engage in any post-
28 signing bad acts.

1 On March 4, 2016, counsel for Uber and Otto jointly retained Stroz Frieberg (“**Stroz**”), a third-
2 party forensic examiner, to confirm the truthfulness of Levandowski’s certification that he and other
3 principals of Otto had not committed any “Pre-Signing Specified Bad Acts.” Uber also required
4 Levandowski and Otto’s other principals to certify that they provided complete and truthful
5 cooperation and responses to Stroz, and the preambles to the Agreement acknowledged that these
6 representations and the investigation were a “material inducement” to Uber to sign the Agreement.

7 In addition to the pre-signing certifications, the Agreement contained several key provisions
8 to ensure that Levandowski would not bring any Google confidential information with him to Uber
9 and had not engaged in undisclosed misconduct while at Google. *First*, Uber required Levandowski
10 to agree that the Agreement would be nullified as to Levandowski if, among other things, he
11 transferred or caused others to transfer Google confidential information to Uber (a “**Post-Signing Bad**
12 **Act**”) and such Post-Signing Bad Act was the subject of a “Former Employer” Claim. (Agreement,
13 § 2.1(a) and Ex. A at 1 and § 2.C.) *Second*, Uber required Levandowski to agree that he would not be
14 indemnified for claims based on any Pre-Signing Bad Acts that he did not truthfully disclose to Uber
15 (the “**Excluded Claim**” provision). (*Id.*, § 2.1(b)(ii).)

16 **B. The Allegedly Indemnified Claim—The Arbitration Panel’s Award.**

17 Levandowski alleges that Uber breached the Agreement by failing to indemnify him from a
18 judgment entered on March 4, 2020 in favor of Google in the amount of \$179,047,998.64. The basis
19 of this judgment is a Corrected Final Award that a JAMS Arbitration Panel entered on December 23,
20 2019 (the “**Award**”). Because the Award is the basis of Levandowski’s indemnification demand, the
21 findings in the Award are determinative for purposes of deciding whether the Award is indemnifiable.
22 *Cleghorn Bar Enters. V. Garlock*, No. A114398, 2008 WL 77584, at *3 n. 7 (Cal. Ct. App. Jan. 8,
23 2008) (holding “it would not be possible to decide this case without looking to the basis for the award,
24 since the central question is whether or not the indemnity agreement covered the conduct”).

25 The Award found Levandowski liable for breach of his Google employment contracts and his
26 duty of loyalty as an employee, and for unfair competition based on two sets of misconduct: the “**Tyto**
27 **Misconduct**” and the “**Otto Misconduct**.” (Award, 31-40.) It ordered Levandowski to disgorge all of
28 his compensation received during the time period covering both sets of misconduct but found that

1 Google had not proved that it suffered any actual competitive harm damages.¹ (*Id.*, 92-99.)

2 **1. The “Tyto Misconduct.”**

3 The Panel held that Levandowski’s employment agreements and his duty of loyalty as an
4 employee precluded him from engaging in side businesses that competed with Google. (*Id.*, 42-62, 66-
5 86.) Levandowski had worked on and came to lead Google’s self-driving car project, called “Project
6 Chauffeur.” The Panel found that at the same time he was employed at Google, starting “as early as
7 May 2012, and at least by August 2012,” Levandowski “created, financed, and provided technical
8 support” to a company that became known as Tyto. (*Id.*, 46.) The Panel concluded that Tyto competed
9 with Google because Tyto was engaged in developing a lower-cost LiDAR sensor and LiDAR sensors
10 are a critical component of the technology that Google also was developing as part of its self-driving
11 car project, Project Chauffeur. (*Id.*, 46-47.)

12 The Panel also found that, at the same time as Levandowski headed Google’s LiDAR team, he
13 engaged his personal attorney, John Gardner, to draft the legal documents to create Tyto. (*Id.*, 32.)
14 Gardner created a limited liability company, Sandstone LLC, which became the owner of Tyto. (*Id.*,
15 33.) Based on the arbitration testimony of Google’s expert, John Hartog, which has been admitted by
16 stipulation in this case, the Panel found that Levandowski created two Alaskan trusts, called the
17 Bismuth and Beryllium Trusts and funded them with several million dollars, and the trusts in turn
18 purchased ownership interests in Sandstone LLC, which owned Tyto. (*Id.*) As Hartog testified and as
19 the Panel found, Levandowski “was the major, if not only, source of funding for Tyto,” funneling over
20 \$2.5 million into Tyto through his two trusts and loaning Tyto \$925,000. As Hartog further explained
21 and the Panel found, the only purpose for routing these moneys through two Alaskan trusts and
22 Sandstone was to hide the fact that Levandowski was funding Tyto. (*Id.*, 33.)

23 Levandowski selected and recruited Tyto’s CEO, Brent Schwarz, and its lead engineer, James
24 Haslim. (*Id.*, 32-33.) He approved the original business plan for Tyto and Schwarz’ long-term goals,
25 which Schwarz described as “to generate revenue and to find buyers to acquire your [Levandowski’s]
26

27 ¹ The panel also awarded \$1.25 million in damages equal to retention bonuses that Google paid to retain
28 employees that Levandowski and his business partner, Lior Ron, tried to solicit to Otto, but this amount of the
Award was paid when Uber satisfied its indemnity in favor of Levandowski’s co-defendant Ron. Thus, this part
of the Award is only relevant to Uber’s claim for equitable indemnity or contribution against Levandowski.

1 company.” (*Id.*) Levandowski also provided technical and logistical support to Tyto. (*Id.*, 46.) He was
2 instrumental in developing Tyto’s LiDAR technology, including outlining key technical tasks,
3 drawing schematics for lasers, and providing “detailed information concerning where to procure the
4 parts necessary to build the laser.” (*Id.*, 33, 47, 67.) Waymo (as successor to Google) would later
5 contend, through expert reports submitted in the Waymo litigation, that the Tyto LiDAR reflected
6 Google trade secrets and confidential information.

7 Levandowski continued his clandestine operation of Tyto from the time he formed it in mid-
8 2012 through the end of his tenure at Google in January 2016 and beyond. During that time, he directly
9 lied to Google when asked about his involvement in Tyto. As Alex Cooper’s arbitration testimony
10 establishes, Levandowski assisted Google in evaluating Tyto’s technology and deciding whether it
11 should purchase Tyto while concealing that it was his own company. (*Id.*, 34.)

12 **2. The “Otto Misconduct.”**

13 The Panel found that Levandowski also breached his Google employment agreement and duty
14 of loyalty when he created a company that eventually became known as Otto to develop LiDAR
15 technology for autonomous trucking and self-driving cars, and then negotiated with Uber in the fall of
16 2015 for Otto to become Uber’s sole supplier of LiDAR technology. (*Id.*, 47-48.) The Panel also found
17 that Levandowski’s solicitation of Google employees to join Otto in December 2015 and January 2016
18 also breached Levandowski’s employment agreement and his duty of loyalty. (*Id.*, 48-51, 68.)

19 **C. Evidence Establishing That Levandowski Is Not Entitled To Indemnification For** 20 **The Arbitration Award.**

21 **1. Levandowski Lied To Stroz, Making Any Claim Based On His Tyto** 22 **Misconduct An Excluded Claim.**

23 Before Uber signed the Agreement, on March 22 and 23, 2016, Stroz examiners asked
24 Levandowski to identify all “side projects,” “side businesses,” “jobs,” or “work” that he engaged in
25 while employed at Google. Levandowski responded that it was common for Google employees to have
26 side projects, and falsely represented that Google was aware of, and approved, all of his external side
27 projects. This was untrue because Google had not approved of Tyto. The outline of the interview
28 prepared by Stroz examiner Mary Fulginiti Genow reflects that she asked Levandowski, “To what
extent did you perform work for any other companies during your employment with Former

1 Employer?” “What did you do? Did it relate to your work for Former Employer?” and “While working
2 for Google, did you ever engage in any other business, activities or services similar to Google?” Notes
3 of the interview reflect that she asked about any “side work/projects” and “everything [he] did[,] not
4 related to what [he] did at Google.” And the memo Stroz interviewers prepared to summarize the
5 interview shows that in response to these questions, Levandowski identified nine side projects—but
6 he did not identify the only relevant one, Tyto. Levandowski himself admits that he did not tell Stroz
7 about his secret ownership, control, and operation of Tyto. Stroz relied on his answers in developing
8 the search terms for Stroz’ forensic review of Levandowski’s devices; Stroz included in those terms
9 the names of all the side businesses that Levandowski had disclosed to Stroz, but did not include
10 “Tyto” and “Odin Wave” (the original name of Tyto), because it had no knowledge of those entities.

11 Levandowski also concealed and lied about his theft of Google confidential information. Uber
12 executives told Levandowski they “absolutely d[id not] want any third-party IP, Google or otherwise”
13 at Uber, and Levandowski “assured [them] he would not bring or download anything.” When Stroz
14 interviewed Levandowski and found Google files on his laptop, Levandowski said that “he kept
15 Google files on his personal Apple MacBook Pro laptop to conduct his work [for Google].”
16 Levandowski further stated that he had never downloaded any Google files to his personal devices
17 with the intention of leaving Google, and that he “w[ould] not rely on any information or data from
18 Google.” He claimed that the Google documents on his devices were there innocently or even
19 accidentally, pursuant to legitimate and permitted activities when he worked for Google; that he had
20 by no means stolen them; and that he had no intent to use them at Uber or elsewhere.

21 At the end of his interview with Stroz, Levandowski attested that all the information he
22 provided in the interview was true and correct. In addition, on April 11, 2016, Levandowski signed an
23 attestation in which he swore:

24 I have provided good faith, complete and truthful responses in all material
25 respects to Stroz’ questions and (b) all of the information I have provided to
26 Stroz is true and correct in all material respects.

26 I have provided to Stroz copies of and/or otherwise advised Stroz of any
27 agreements or other obligations to which I am subject with ‘Former Employer’
28 ... (collectively, ‘Agreements’), and subject to any matters or information
disclosed to Stroz, I have complied with my obligations under any
Agreements.

1 Contrary to those attestations, Levandowski did not disclose to Stroz (i) his involvement in Tyto,
2 which breached several fiduciary, contractual, and statutory duties and obligations to Google, and (ii)
3 that he had taken Google’s confidential information for his personal benefit.

4 **2. After The Agreement Was Signed, Levandowski Secretly Caused Google**
5 **IP To Be Transferred To Uber, Thereby Committing Post-Signing Bad Acts**
6 **And Voiding The Agreement.**

7 Levandowski committed at least two Post-Signing Bad Acts that were the subjects of a Former
8 Employer Claim: the transfer of the code for Google’s “planner” and certain confidential information
9 related to its LiDAR technology. Both Bad Acts were the subject of a Former Employer Claim.

10 **a. The Waymo Lawsuit Is A “Former Employer Claim.”**

11 On February 23, 2017, Google’s affiliate, Waymo LLC (“**Waymo**”), filed suit against Uber,
12 Otto, and Otto Trucking, LLC, for trade secret misappropriation by Levandowski. The Waymo
13 Lawsuit is a Former Employer Claim because it is an action against two indemnified parties—Otto
14 and Otto Trucking—brought by a “Former Employer”—Waymo. There can be no dispute about this;
15 when Levandowski sought indemnification from Uber for his criminal indictment, Levandowski
16 himself claimed that Waymo’s suit was a “Former Employer Claim.”

17 Waymo is a “Former Employer” even though Levandowski never technically worked for
18 Waymo (Levandowski worked on Project Chauffeur when it was housed within Google, but it was
19 later spun off into a separate entity, Waymo). That is because the Agreement defines a “Former
20 Employer” to include “Affiliates” of any “Person” that “such Employee has previously ... provided
21 services to as an employee....” (Agreement, § 1.) Uber, Google, Levandowski, and non-party Waymo
22 have stipulated that Waymo is a Google Affiliate: “[f]rom its inception on August 5, 2016 to date,
23 Waymo LLC ... has been a controlled subsidiary of Alphabet Inc.,” and “[f]rom its inception until
24 September 30, 2017, Waymo LLC was also a controlled subsidiary of Google Inc. (which was renamed
25 Google LLC on September 30, 2017 and is also a controlled subsidiary of Alphabet Inc.).” [Dkt. 102
26 at 2.] Accordingly, Google and Waymo are and were “Affiliates” within the meaning of the Ottomotto
27 Merger Agreement and the Agreement. (Ottomotto Merger Agreement Ex. A (“Affiliate” definition);
28 Agreement § 1 (“Definitions”).) Because Waymo is an Affiliate of Google, and Google was a former

1 employer of Levandowski, Waymo meets the definition of a “Former Employer” of Levandowski. (*Id.*
2 § 1 (“Former Employer” definition).)

3 Under the Post-Signing Bad Act provisions, any Indemnified Person, including Levandowski,
4 forfeits the right to indemnification for all purposes if a Final Judgment (to be entered in this case)
5 determines that he committed a Post-Signing Bad Act that was the subject of a Former Employer
6 Claim against any other Indemnified Person. Two of Waymo’s trade secret allegations against Otto
7 and Otto Trucking (both Indemnified Persons) established Post-Signing Bad Acts that Levandowski
8 directed or caused: (i) the transfer of the “planner code” that was the subject of Dr. Gerdes’
9 independent analysis; and (ii) the transfer of Google confidential LiDAR information through the sale
10 of Tyto to Otto.

11 **b. Levandowski’s Transfer Of The Planner Code.**

12 One of Waymo’s claims against Uber, Otto, and Otto Trucking related to the allegation that in
13 May 2016, Otto Transferred a certain planner code to Uber and that the planner code allegedly
14 included Google trade secrets. As discussed below, Mr. Levandowski’s directive to transfer this code
15 constitutes a Post-Signing Bad Act.

16 As part of the settlement agreement in the Waymo case, Uber agreed with Waymo to jointly
17 engage an independent, leading autonomous-vehicle expert, Dr. J. Christian Gerdes, to determine
18 whether Uber’s technology incorporated any of a number of Google’s trade secrets. Dr. Gerdes
19 conducted an extensive analysis, receiving multiple written submissions from Waymo and Uber,
20 interviewing several witnesses, and reviewing highly proprietary source code and technology for both
21 Waymo’s and Uber’s autonomous-vehicle programs. He concluded, in a binding and non-appealable
22 expert analysis to which he will testify in this case, that the planner code that Levandowski caused to
23 be transferred from Otto to Uber in May 2016 (before Uber acquired Otto), contained a Google trade
24 secret.² Prior to Dr. Gerdes’ analysis, Uber had no knowledge that this intellectual property, which
25 Otto’s employees asserted they had developed independently, in fact reflected Google trade secrets.
26
27

28 ² In the context of autonomous vehicles, the “planner” is the software that determines the vehicle’s speed and trajectory.

1 Levandowski directed those Otto employees to send Otto's planner code to Uber for
2 incorporation into Uber's autonomous vehicle technology. Jur Van den Berg will testify that he sent
3 the code only because Levandowski directed him to do so, as an "advertisement" for why Uber should
4 close its pending acquisition of Otto.

5 **c. Levandowski's Transfer Of Confidential Google Information**
6 **Related To LiDAR Technology.**

7 The second relevant Post-Signing Bad Act was Levandowski's conduct in causing Otto to
8 acquire Tyto in May 2016. In its lawsuit, Waymo alleged that Tyto's LiDAR technology reflected the
9 same LiDAR technology that Google was using and that constituted Google confidential information.

10 In the lead-up to Uber's acquisition of Otto, Levandowski urged Uber to allow Otto to acquire
11 Tyto. When Uber was deciding whether to grant the permission required under the Otto merger
12 agreement, it had no idea that Tyto was a company Levandowski controlled and that the approval
13 could ultimately lead Uber to inadvertently acquire technology that was developed using Google's
14 confidential information at Levandowski's direction. In response to Uber's inquiries about Tyto's
15 ownership, Levandowski told Cameron Poetzsch, Uber's vice-president of corporate development,
16 that "one guy had nearly all of [Tyto]" without telling Uber he (Levandowski) was the "one guy."
17 Relatedly, Levandowski also concealed his involvement in developing Tyto's LiDAR technology.

18 **D. Levandowski's Alleged Damages.**

19 Levandowski asks for damages equal to the Award plus unspecified consequential damages
20 and pre-judgment interest. As set forth below, Levandowski is not entitled to any damages because
21 the Agreement is void based on his commission of Post-Signing Bad Acts. Further, as set forth in
22 Uber's separate *Motion In Limine Barring Evidence And Argument In Support Of Plaintiff's Alleged*
23 *Consequential Damages Claim* [Dkt. 391], neither the Agreement nor the evidence supports the
24 request for consequential damages. In addition, because interest is not running on Google's judgment
25 due to the bankruptcy filing (*see* 11 U.S.C. § 502(b)(2)), the Agreement, which limits a recoverable
26 "Expense" to "interest ... that is out-of-pocket," also bars the imposition of pre-judgment interest.

27 In the event the Court finds that Levandowski is entitled to some indemnification, it will be
28 necessary to determine how much of the Google judgment is indemnifiable. The Panel ordered

1 Levandowski to disgorge all monetary compensation he received between August 2012 and January
2 27, 2016, consisting of \$767,051.95 in salary and \$126,544,500 in deferred compensation received
3 pursuant to the Project Chauffeur Bonus Plan (the “**Plan**”). As the Award reflects, the Tyto
4 Misconduct occurred during the entire 44 months that the deferred compensation was earned. The Otto
5 Misconduct overlapped with the Tyto Misconduct only for the last four months of that 44-month
6 period.

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

[REDACTED]

E. Uber's Proof Of Claim.

The evidence will establish that Uber's proof of claim should be allowed and it has offset rights amounting to at least \$270,241,203.31. The evidence is undisputed that Uber paid: (i) \$250 million in consideration to Google for Levandowski's misconduct; (ii) \$9,453,135.87 to indemnify Lior Ron; and (iii) \$10,788,067.41 in attorneys' fees and costs on Levandowski's behalf.

Levandowski's criminal theft of trade secrets was at the heart of the Waymo case and the primary reason why Uber paid \$250 million (as well as agreed to Dr. Gerdes' independent review) to settle that case. Levandowski cannot reasonably complain that the settlement was "too rich," when his criminal misconduct made the case very difficult to defend, and his invocation of the Fifth Amendment and continued lies to Uber about his theft of trade secrets only compounded that difficulty. Initially, Levandowski assured everyone at Uber that he had not taken any trade secrets to use at Uber. In an Uber "all hands" meeting soon after Waymo filed suit, Levandowski claimed he downloaded information while at Google in order to work from home. Later, he told Uber he had downloaded some files because "he was worried that Google was not going to pay him his bonus and he wanted to be able to demonstrate the work he had done in order to earn that bonus." Uber relied upon those continued lies.

Levandowski's trade secret theft created significant exposure for Uber. Judge Alsup, who presided over the case, granted Waymo's motion for preliminary injunctive relief early in the case, noting that Waymo "ha[d] show[n] compelling evidence that ... Anthony Levandowski, downloaded over 14,000 confidential files from Waymo immediately before leaving his employment there[,] that "Levandowski had taken and retained possession of Waymo's confidential files[,] that the "files likely contain[ed] at least some trade secrets[,] and that "provisional relief [was] warranted." He also observed that Waymo's decision to sue only Uber, and not Levandowski, was merely a strategic choice

1 to avoid having to arbitrate the case. (*Waymo LLC v. Uber Technologies, Inc.*, Case No. 3:17-cv-
2 00939-WHA, Dkt. 2219.) Even Levandowski admitted that “[a]lthough [he] was not a party to
3 Google/Waymo’s lawsuit, *he was unquestionably at its center*” because “Google’s case was premised
4 on its allegation that, when Levandowski chose to leave Project Chauffeur, he stole some 14,000 files,
5 representing ‘billions’ of dollars in value, with the intent of replicating Google’s LiDAR devices at
6 Uber.” (*See United States v. Levandowski*, 3:19-cr-00377-WHA, Dkt. 87 (emphasis added).)
7 Principally because of Levandowski’s misconduct, and not because of any misconduct of its own,
8 Uber was required to pay Waymo (as successor to Google) \$250 million to settle the case. Under basic
9 principles of equitable indemnity, Levandowski should bear full responsibility for that loss and at a
10 minimum should be held liable for at least 90% of the loss.

11 **LEGAL THEORIES ON WHICH UBER RELIES**

12 In his two remaining claims after summary judgment—Counts II and III—Levandowski
13 alleges that Uber is in breach of the Agreement; in Count II he seeks “specific performance” and in
14 Count III he seeks contract damages. Levandowski’s claim to specific performance should be easily
15 rejected. “Specific performance of a contract will not be compelled when an adequate remedy exists
16 at law, and if monetary damages afford adequate relief and are not extremely difficult to ascertain, an
17 injunction cannot be granted.” *Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp.*, 255 Cal. App. 2d
18 300, 306 (1967) (citing *Morrison v. Land*, 169 Cal. 580 (1915)); accord Cal. Civ. Code § 3422(1)-(2);
19 Cal. Civ. Code § 3423(e). Here, by seeking a “precise amount of money” in “indemnity” from Uber,
20 Levandowski “disclosed the legal remedy of damages was adequate” and he therefore is “not entitled
21 to specific performance.” *Valley Crest Landscape Dev., Inc. v. Mission Pools of Escondido, Inc.*, 238
22 Cal. App. 4th 468, 492 (2015) (holding plaintiff could not seek specific performance of
23 indemnification agreement); *In re Branford Partners, LLC*, No. SV 06-12551-KT, 2008 WL 8448329,
24 at *15 (B.A.P. 9th Cir. Oct. 24, 2008) (party was not entitled to specific performance after it “made a
25 specific demand for recovery of monetary damages”). Accordingly, Count II should be dismissed.

26 Both Counts II and III also fail for the additional reasons set forth below.
27
28

1 **I. The Agreement Is Void.**

2 **A. Levandowski's Multiple Post-Signing Bad Acts (Affirmative Defense 4 and**
3 **Counterclaim III).**

4 The Agreement's Post-Signing Bad Acts provision nullifies Levandowski's right to
5 indemnification. Agreement Section 2.1(a) provides that if any Diligenced Employee (of which
6 Levandowski was one) is found to have committed a Post-Signing Bad Act that was the subject of a
7 "Former Employer Claim," then "Purchaser's indemnification obligation to [that person] pursuant to
8 this Agreement *shall immediately become null and void* and of no further force and effect"
9 (Agreement, § 2.1(a) (emphasis added).) The definition of a Post-Signing Bad Act includes inducing
10 or directing another person to "transfer[] ... any ... electronic copy, or any other form of confidential
11 document, file, data or information of any Former Employer [here Google] ... without the express
12 written consent of such Former Employer." (*Id.*, Ex. A at 1; § 2.C.)

13 Section 2.1(a) was intended to provide a fire wall that would protect Uber in the event any
14 Diligenced Employee had misappropriated Google proprietary information. This important provision
15 also incited Levandowski not to encourage or direct another person to share Google confidential
16 information with anyone at Uber.

17 The evidence will establish that Levandowski committed at least two Post-Signing Bad Acts:
18 (i) he "directed, caused, and [or] induced" Jur van den Berg to send Uber the planner code in May
19 2016 and (ii) he urged Uber to let Otto acquire Tyto, resulting in Uber's ultimate possession of Google
20 confidential information related to the LiDAR technology. Both of these Bad Acts occurred after the
21 Agreement was signed, became the subject of a Claim by a Former Employer, and involved conduct—
22 the improper transfer of confidential information—that the Agreement prohibited. Thus, they each
23 meet the definition of a Post-Signing Bad Act and result in the Agreement becoming "null and void."
24 (Agreement, § 2.1(a).)

25 Levandowski has no serious defense to his commission of these Post-Signing Bad Acts. As to
26 the planner, Levandowski may contend that he, like Uber, did not know the planner code contained
27 Google confidential information. Regardless whether that is true, the Agreement allocates that risk of
28 ignorance to Levandowski, who was in the best position to protect against a Post-Signing Bad Act.

1 Further, California law supports the allocation that the parties agreed to, because California law
2 disfavors private indemnification agreements and strictly construes them against the indemnitee.
3 *Prince v. Pac. Gas & Elec. Co.*, 45 Cal. 4th 1151, 1158 (2009) (citing *Crawford v. Weather Shield*
4 *Mfg. Inc.*, 44 Cal. 4th 541, 552 (2008)). The protection Uber bargained for includes the nullification
5 of all indemnification for any otherwise Indemnified Person (here Levandowski) who “directed,
6 caused, induced, knowingly contributed to, or knowingly permitted” someone else to engage in a
7 prohibited transfer. (Agreement, 1.) Thus, the definition explicitly includes both knowing and
8 unknowing conduct. As between Levandowski and Uber, the risk allocation was reasonable:
9 Levandowski, as former leader of Google’s Project Chauffeur and head of Otto, was in a far better
10 position than Uber to investigate and determine whether the code that he directed Van den Berg to
11 transfer contained Google confidential information and whether Tyto’s technology reflected Google
12 confidential information.

13 Likewise, Levandowski cannot argue that Uber should have known of his misconduct, because
14 reliance is not an element of Section 2.1(a) for the basic reason that it governs conduct *after* the
15 Agreement was executed. Accordingly, the Court should enter judgment for Uber on Levandowski’s
16 breach of contract claims (Counts II and III) and Uber’s Affirmative Defense 4 and Counterclaim III.

17 Finally, while Levandowski may argue that Uber willingly accepted the planner code, he
18 cannot establish that Uber gave “prior written consent” to the May 10, 2016 transfer of Google
19 confidential information (in the planner code), as is his burden under Appendix A of the
20 Indemnification Agreement. To the contrary, Uber had made clear that it didn’t want any Google IP
21 and Levandowski didn’t tell Uber that the Planner code contained Google IP. In fact, it was not until
22 much later, when Waymo claimed the Planner incorporated its trade secrets, that this issue even arose.

23 **B. Levandowski’s Unclean Hands (Affirmative Defense 8).**

24 Levandowski’s criminal misconduct and fraud also present a paradigm case for applying the
25 doctrine of unclean hands. Simply put, Levandowski should not benefit from a contract that he
26 procured through fraud. Under California law, unclean hands is a complete defense to a legal claim
27 for breach of contract. To prevail on unclean hands, Uber need only show Levandowski acted in “bad
28 faith, or inequitabl[y]” in connection with the Agreement. *See Fladeboe v. Am. Isuzu Motors Inc.*, 150

1 Cal. App. 4th 42, 56 (2007).

2 Here, Levandowski's inequitable misconduct relates "directly to the transaction concerning
3 which the complaint is made," specifically, the Agreement that he procured by concealing his massive
4 felony trade secret theft and clandestine control of Tyto. *Pond v. Ins. Co. of N. Am.*, 151 Cal. App. 3d
5 280, 289-90 (1984). With unabashed hubris, Levandowski comes before the bankruptcy court seeking
6 to use the Agreement as a means to retain \$127 million-plus in deferred compensation that he was not
7 entitled to receive and that he has been ordered to disgorge to Google. Foisting responsibility on Uber
8 to pay Google, so that Levandowski can keep the economic benefit of fraudulently procured monies
9 to which he has no entitlement, would be inequitable in the extreme. Indeed, it would defeat the very
10 purpose of disgorgement, which is not to compensate the victim, but rather "to deprive the wrongdoer
11 of his ill-gotten gain." *Federal Trade Commission v. Neovi, Inc.*, No. 06-CV-1952 JLS (JMA), 2009
12 WL 10672945, at *2 (S.D. Cal. May 18, 2009).

13 Analogous cases have applied the doctrine of unclean hands to bar breach of contract claims
14 based on the plaintiff's prior misconduct, including the plaintiff's dishonest conduct in procuring the
15 contract in the first place. *See, e.g., Unilogic, Inc. v. Burroughs Corp.*, 10 Cal. App. 4th 612, 620-21
16 (1992) (applying unclean hands doctrine in action for breach of joint development project). Courts
17 have found unclean hands based on misconduct far less egregious than Levandowski's brazen and
18 extensive fraud and theft. For example, where an investor concealed facts about his conveyance of and
19 ownership interest in a property, his behavior was not found to be fraudulent but nonetheless
20 constituted inequitable conduct that barred him from recovering on a contract. *See DeRosa v.*
21 *Transamerica Title Ins. Co.*, 213 Cal. App. 3d 1390, 1396 (1989) ("The doctrine does not require the
22 party seeking relief to be guilty of fraud; it is sufficient if he merely acted unconscientiously."); *see*
23 *also Pond*, 151 Cal. App. 3d at 291 ("[a]ny unconscientious conduct ... [by a party] which is connected
24 with the controversy [before the court]" is sufficient).

25 The scope and gravity of Levandowski's misconduct in procuring the Agreement is beyond
26 dispute. This Court has already stated that Levandowski's guilty plea is "smoking gun" evidence "that
27 Mr. Levandowski fraudulently concealed his true intent" in stealing Google trade secrets. [Dkt. 344 at
28 56.] The Court also ruled that Levandowski made "patently false" misrepresentations to conceal his

1 ownership and control of Tyto [*id.*, 37], and answered with “explicit lies in response to Stroz’ direct
2 questioning.” [*Id.*, 66]. And, as discussed below, Levandowski’s conduct in obtaining the \$127 million
3 in deferred compensation under false pretenses also was felonious.

4 During the very time that he was negotiating the Agreement in early 2016, Levandowski was
5 committing what Judge Alsup described as “the biggest trade secret crime I have ever seen.”
6 Levandowski was rightfully concerned that his \$127 million in deferred compensation from Google
7 would not be paid if Google discovered either his Tyto fraud or his massive theft of trade secrets. As
8 part of his scheme to retain the economic benefits of this ill-gotten \$127 million, he fraudulently
9 induced Uber to indemnify him, including by representing that “bad feelings between him and Google
10 management” might result in a “retaliatory legal action” by Google. This Court ruled in denying
11 summary judgment that “[t]he record strongly indicates that Mr. Levandowski made material
12 misrepresentations of fact [to Uber] with respect to his relationship to Tyto and his intent in possessing
13 Google/Waymo confidential information.” [*Id.*, 84.] The trial record will conclusively establish his
14 material misrepresentations.

15 Levandowski’s inequitable conduct persisted as Uber determined whether to close the
16 acquisition of Otto. After the Agreement was signed, Levandowski caused Otto to acquire Tyto, still
17 concealing from Uber his control of Tyto. He also caused Otto to transfer to Uber source code for the
18 planner that contained purloined Google trade secrets. This continued inequitable conduct “affect[ed]
19 the equitable relationship between the litigants” and bars Levandowski from collecting here. *Unilogic*,
20 10 Cal. App. 4th at 621. Accordingly, the Court should enter judgment for Uber on Levandowski’s
21 breach of contract claims (Counts II and III).

22 **C. Levandowski’s “Knowingly Wrongful Conduct” Precludes Indemnification**
23 **(Affirmative Defense 3).**

24 California Civil Code Section 2773 bars private agreements to indemnify someone for future
25 conduct that is “known ... to be unlawful.” Similarly, Section 2774 prohibits indemnification of past
26 wrongful conduct, if it is established, to a civil standard of proof, that the conduct was felonious. *See*
27 *Meissner v. Paulson*, 212 Cal. App. 3d 785, 788-89 (1989) (relying upon §2774 to deny
28 indemnification claim even though no felony charges were ever brought). “Both section 2773 and

1 section 2774 are intended to prevent the encouragement of illegal acts,” and “when both past and
2 future acts are covered by an indemnity agreement, section 2773 should apply.” *Lemat Corp. v. Am.*
3 *Basketball Ass’n*, 51 Cal. App. 3d 267, 279 (1975).

4 Levandowski’s course of wrongful conduct in obtaining a bonus to which he knew he was not
5 entitled is quintessential “knowingly wrongful conduct.” Levandowski took affirmative acts to conceal
6 his misconduct, which was so “pervasive and antithetical to his duties to Google” that the Panel found
7 it required return of all of his compensation. (Award, 93.) Levandowski undisputedly knew that his
8 trade secret theft and Tyto misconduct was wrongful—and for that reason went to great lengths to
9 conceal that misconduct both from Google and Uber. Indisputably, part of his motivation for
10 concealing that misconduct was his desire to obtain the \$127 million in deferred compensation that
11 Google paid him in two installments, in December 2015 and August 2016. Because Levandowski
12 engaged in knowingly wrongful conduct in procuring these bonus payments under false pretenses,
13 Section 2773 precludes indemnification for the disgorgement of those bonus payments.

14 Indeed, even though it is only necessary to prove “knowingly wrongful conduct” under Section
15 2773, Levandowski’s misconduct was so egregious it also qualifies as felonious misconduct that
16 precludes indemnification under Section 2774. Obtaining his bonus under false pretenses was grand
17 theft, which is a felony under California law. California Penal Code Section 484(a) states that “Every
18 person who shall ... knowingly and designedly, by any false or fraudulent representation or pretense,
19 defraud any other person of money ... is guilty of theft.” And that theft constitutes “grand theft,” which
20 is presumptively a felony, when the amount taken exceeds \$950. Cal. Penal Code § 487(a).

21 California courts have recognized that obtaining compensation under false pretenses is a
22 felony. *See, e.g., People v. Mahdavi*, No. G033693, 2006 WL 711284, at *1-2 (Cal. Ct. App. Mar. 21,
23 2006) (employee committed felony grand theft when she obtained a \$5,000 bonus under false
24 pretenses by concealing that she failed her CPA examination); *People v. Andrews*, 165 Cal. App. 2d
25 626, 638-39 (1958) (same); Cal. Penal Code § 484(a) (offense encompasses theft by false pretenses).
26 And it is no defense for Levandowski to claim that he was not *charged* with a felony for receiving his
27 two deferred compensation payments under false pretenses. Section 2773 does not require felonious
28 conduct, and Section 2774 does not require a criminal charge or conviction. In *Meissner*, a California

1 Appellate Court applied Section 2774 to bar indemnification, even though the arsonist who set a
2 building on fire was never charged. 212 Cal. App. 3rd at 788-89. *Meissner* is consistent with a long
3 line of California court decisions recognizing that unless a statute explicitly requires a felony
4 “conviction,” courts should not read such a requirement into the statute. In *Bell v. Feibush*, 212 Cal.
5 App. 4th 1041, 1049 (2013), for example, the court awarded treble damages in a civil case based on
6 Penal Code Section 496 even though the defendant was never convicted in a criminal case, holding
7 that “[i]t is not this court’s role to replace the word ‘violation’ with the word ‘conviction’ in the
8 statute.”³

9 Accordingly, judgment should be entered against Levandowski and in favor of Uber on Counts
10 II and III and Affirmative Defense 3.

11 **D. Public Policy And The Agreement Bar Indemnification For A Disgorgement**
12 **Award (Affirmative Defenses 1 and 2, Counterclaim 1).**

13 Both as a matter of the Agreement and of California law, Levandowski also cannot recover
14 because the basis of the Award is disgorgement of compensation that he received from Google.

15 Section 2.4(b) of the Agreement requires the Court to deduct from any indemnified amount
16 (termed an “Expense” under the Agreement) “an amount equal to the amount of any proceeds actually
17 received by any Indemnified Person from ... any other third parties in connection with such Expense.”
18 Here, Levandowski received a payment from a third party—Google—equal to the amount of the
19 compensation he was required to disgorge and for which he seeks indemnity. Thus, under the
20 Agreement, Uber is not required to indemnify Levandowski for the \$127.3 million he received from
21 Google or the related prejudgment interest of \$45.5 million. When those amounts are eliminated from
22 the Award and one subtracts the amounts that Uber paid on behalf of co-defendant Ron, the only
23 remaining unpaid, indemnifiable part of the Award is the separately awarded attorneys’ fees of
24 \$1,869,596.27 and costs of \$57,468.38.

25
26 ³ *Accord Mancinas v. Pollard*, No. 18-cv-06235-YGR PR, 2020 WL 43266, at *5-7 (N.D. Cal. Jan. 3, 2020)
27 (court reasoned that California Penal Code Section 186.22(a) applies to a defendant “who willfully promotes,
28 furthers, or assists in any felonious criminal conduct,” and thus does “not require a conviction”); *People v. McCarthy*, 244 Cal. App. 4th 1096, 1107 (2016) (same); *see also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 488 (1985) (refusing to read a conviction requirement into the RICO statute where “[t]he word ‘conviction’ [did] not appear in any relevant portion of the statute”).

1 In addition, as set forth more fully in Uber’s Rule 12(c) Motion [Dkt. 70], the California
2 Supreme Court has held that public policy prohibits indemnification for disgorgement of wrongfully
3 obtained monies. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1269 (1992). The clear “public
4 policy rationale” behind this rule is that “[w]hen the law requires a wrongdoer to disgorge money or
5 property acquired through a violation of the law, to permit the wrongdoer to transfer the cost of
6 disgorgement to an insurer would eliminate the incentive for obeying the law.” *Id.* “Otherwise, the
7 wrongdoer would retain the proceeds of his illegal acts, merely shifting his loss to an insurer.” *Id.*
8 (citations omitted). Stated differently, “[a]n insured incurs no loss within the meaning of the insurance
9 contract by being compelled to return property that it had stolen, even if a more polite word than
10 ‘stolen’ is used to characterize the claim for the property’s return.” *Level 3 Commc’ns, Inc. v. Fed.*
11 *Ins. Co.*, 272 F.3d 908, 911 (7th Cir. 2001).

12 Here, there can be no dispute the Award against Levandowski was an order of disgorgement
13 (Award, 93), the purpose of which was to “deprive [Levandowski] of [his] ill-gotten gains.” *Federal*
14 *Trade Commission v. Lucaslaw Ctr., Inc.*, No. SACV 09-0770 DOC (ANx), 2010 WL 11506885, at
15 *8 (C.D. Cal. June 3, 2010). Thus, if the Court enters any judgment here, the amount should be at most
16 limited to the separately awarded attorney’s fees and costs totaling \$1,927,064.65.

17 **II. Most Of The Award Is For An Excluded Claim, For Which Uber Has No Obligation to**
18 **Provide Indemnity (Affirmative Defenses 5 and 9 and Counterclaim IV).**

19 Even if the Agreement is not void, Levandowski still is not entitled to indemnification for most
20 of the Award because the Award is primarily based on an Excluded Claim—his Tyto Misconduct.
21 Section 2.1(b)(ii) of the Agreement precludes indemnification for an “Excluded Claim.” An Excluded
22 Claim includes any claim arising out facts that “either (A) were not truthfully disclosed by
23 [Levandowski] to [Stroz] in response to relevant inquiries in connection with the due diligence
24 performed by [Stroz] or (B) were not contained or reflected in the due diligence materials provided by
25 [Levandowski] to [Stroz].” (Agreement, § 2.1(b)(ii) (emphasis added).)

26 The use of the disjunctive terms “either” and “or” means that only one of (A) *or* (B) need be
27 satisfied in order for a claim to be an Excluded Claim. It is a well-established principle of contract
28 construction that an “either” “or” disjunction means only *one* of the listed alternatives is required. *See*

1 *Houge v. Ford*, 44 Cal. 2d 706, 712 (1955) (“the function of the word ‘or’ is to mark an alternative
2 such as ‘either this or that’”); *Valdez v. Superior Court of San Bernardino Cty.*, No. E070656, 2019
3 WL 1236932, at *2 (Cal. Ct. App. Mar. 19, 2019) (rejecting argument that both factors needed to exist
4 because of the choice of “the disjunctive word ‘or’ instead of the conjunctive word ‘and’ to connect
5 the two factors, meaning, of course, that the presence of either factor alone is sufficient”).⁴ Further,
6 reliance is not an element of this contract defense.

7 Although only one prong needs to be satisfied to meet the definition of Excluded Claim, in this
8 case, Levandowski’s misrepresentations and material omissions satisfy both prongs. *First*, as detailed
9 above, Levandowski admits that he did not tell Stroz about his funding and control over Tyto even
10 though he was asked directly to disclose all of his side businesses. In addition, he lied when he
11 provided Uber with certifications that he had provided truthful and complete answers to Stroz’
12 questions. *Second*, by not disclosing Tyto as an entity that he financed and controlled, Levandowski
13 prevented Stroz from learning the significance of Tyto so that it could investigate his Tyto Misconduct
14 when it searched the millions of documents imaged from his devices. Based on this evidence, the Tyto
15 Misconduct constitutes an Excluded Claim under the Agreement and Uber has no contractual
16 obligation to provide indemnity for that claim. Accordingly, the Court should rule against
17 Levandowski and in favor of Uber on Affirmative Defenses 5 and 9 and Counterclaim IV.

18 **III. Any Indemnification That The Court Awards To Levandowski Should Be Less Than \$5**
19 **Million.**

20 According to Levandowski, even though he was engaged in the Tyto Misconduct for the entire
21 disgorgement period of 44 months and only engaged in the Otto Misconduct for, at most, 4 months,
22 all but \$6,050,300 of Google’s total judgment (or only 3.3%) should nonetheless be attributed to his
23 Otto Misconduct. Levandowski’s argument goes like this: (i) it is impossible to allocate as between
24 the Otto and Tyto Misconduct during the time period in which this misconduct overlapped (September
25 30, 2015 through January 27, 2016); (ii) therefore, the Court should assume that Levandowski was
26

27 ⁴ The parol evidence makes even more clear that the parties intentionally chose the “either/or” construct. As
28 originally drafted, Section 2.1(b)(ii) used the word “and” between subsections (A) and (B). Uber edited the
provision to replace the conjunctive word “and” with the disjunctive language “either (A) ... or (B)” that appears
in the final contract.

1 fired on September 29, 2015 and determine what he would have been entitled to receive under the
2 Plan had he left Google on that date; and (iii) because he supposedly only would have been entitled to
3 receive \$6,050,300 of his deferred compensation on September 29, 2015, the Court should treat the
4 balance of his deferred compensation (96.7%) as attributable solely to the four-month period when the
5 Otto and Tyto Misconduct overlapped and find that it is entirely indemnifiable.

6 Each step of this argument fails for multiple reasons. For starters, it is possible to allocate
7 between the Tyto and Otto Misconduct, a point this Court recognized when it denied Levandowski's
8 summary judgment motion. [Dkt. 344, at 81-83.] One way to allocate is to compare the overall time
9 period of each type of misconduct. The Tyto Misconduct occurred for 44 months; the Otto Misconduct
10 for four months. Thus, 91.6% (44/48) of the total time of misconduct is attributable to Tyto Misconduct
11 and 91.6% of the Award should be deemed an Excluded Claim.

12 Another means of allocation is to look at when the deferred compensation was actually *earned*
13 as opposed to when it was *received*—as bankruptcy courts routinely do when considering whether
14 deferred compensation and bonuses are part of the estate. *Rau v. Ryerson (In re Ryerson)*, 739 F.2d
15 1423, 1426 (9th Cir. 1984) (holding an employee's right to payment is property of the estate if based
16 on pre-petition work, even if payment was at the company's option and would be due post-petition);
17 *accord Parks v. Dittmar (In re Dittmar)*, 618 F.3d 1199, 1205 (10th Cir. 2010) (holding that debtor's
18 interest in an equity participation plan was a pre-petition asset part of the bankruptcy estate and subject
19 to creditor claims, even though the condition to payment occurred post-petition); *In re Gnadt*, No. 11-
20 10378-BFK, 2015 WL 2194475, at *5 (Bankr. E.D. Va. May 7, 2015) (deferred compensation under
21 an IRC 409A plan was property of the estate because debtor's rights vested based on pre-petition
22 work).

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

[REDACTED]

Levandowski's second assumption—that the Court should measure what Levandowski might have been entitled to claim as deferred compensation if he had been terminated on September 29, 2015—proves too much. The premise of Levandowski's argument necessarily is that nothing he did in the first 40 months of his misconduct impacted his right to receive the deferred compensation Google paid to him. Thus, he urges the Court to measure what he would have received if he was terminated on September 29, 2015 when addressing how much of the deferred compensation is allocable to the Tyto Misconduct-only period. But if, as Levandowski argues, none of the 40 months of service in the Tyto-only time period is relevant to the deferred compensation Levandowski received, then the Court must measure what deferred compensation Levandowski would have received if he worked only from September 30, 2015 through January 27, 2016. The answer is indisputable: he would have received no deferred compensation and the only compensation subject to disgorgement would have been his salary. [REDACTED]

[REDACTED]

Put differently, even if Levandowski is entitled to full indemnification for the four months during which he committed both the excluded Tyto Misconduct and the indemnifiable Otto Misconduct, his indemnification should be limited solely to what he *earned* between September 30, 2015 and January 27, 2016. [REDACTED]

[REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED] This argument suffers from the same
7 equitable and legal flaws as his other allocation arguments.

8 Levandowski's "date of increase in value" argument also misapplies California law. "The
9 general rule ... is that profits subject to disgorgement include any form of consequential gains or other
10 secondary enrichment that is identifiable and measurable on the facts of the case and not unduly
11 remote." *Uzyel v. Kadisha*, 188 Cal. App. 4th 866, 894 (2010) (internal citations and quotation marks
12 omitted); *see also Meister v. Mensinger*, 230 Cal. App. 4th 381, 399 (disgorgement must include any
13 "consequential gain[] that is identifiable and measurable and not unduly remote"); *Am. Master Lease*
14 *LLC v. Idanta Partners, Ltd.*, 225 Cal App. 4th 1451, 1488-89 (2014) (erroneous to consider only the
15 value of benefits at the time they were acquired, because restitution must include any later net profit
16 attributable to the underlying wrong); *Cty. of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 543
17 (2007) (disgorgement extends to "all advantages ... gained"); *CTC Real Estate Servs. v. Lepe*, 140 Cal.
18 App. 4th 856, 858 (2006) (disgorgement includes later earned profits from sale of wrongfully obtained
19 property); Restatement (Second) of Agency § 403 ("If an agent receives anything as a result of his
20 violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its
21 proceeds, to the principal."). Thus, under well-established California law, any later increase in value
22 of the deferred compensation that vested during the Tyto Misconduct period is subject to disgorgement
23 because of that misconduct and is an Excluded Claim.

24 Any other result would unjustly enrich Levandowski by allowing him to retain tens of millions

25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 of dollars that he was never entitled to receive and evade the terms of the Agreement, thereby defeating
2 the fundamental public policy limitations that disfavor private indemnification for misconduct.

3 **IV. Levandowski Owes Uber Over \$270 Million In Fraud Damages That May Be Setoff**
4 **Against Any Judgment (Affirmative Defense 10, Counterclaim VI).**

5 Although the Court held that Uber could not recover affirmatively on its fraud claim, Uber is
6 entitled to establish the claim for purposes of offsetting any judgment against it. [Dkt. 344, at 45-47.]
7 Levandowski's fraud also makes Uber's Claim non-dischargeable. 11 U.S.C. § 523(a)(2)(A); (a)(4);
8 (a)(6). The evidence establishes that Levandowski lied to Uber about his misappropriation of Google's
9 confidential information. Uber justifiably relied upon those misrepresentations in providing indemnity
10 and closing the Otto transaction. Uber repeatedly insisted that Levandowski not bring any Google IP
11 with him, because it recognized that its entire program could be jeopardized if it were infected with
12 improperly acquired IP. As a result of Levandowski's fraudulent concealment of his trade secret theft,
13 the entire purpose of the Otto acquisition was defeated. As a result, Uber was damaged in the amount
14 of \$270,241,203.31 that may be set off against any judgment Levandowski obtains. *See All. Mortg.*
15 *Co. v. Rothwell*, 10 Cal. 4th 1226, 1239 (1995) (setting forth elements of a fraud claim); *Labor Comm'r*
16 *v. Ramirez (In re Ramirez)*, 556 B.R. 446, 451-52 (elements of § 523(a)(2)(A) claim); *Hamilton v.*
17 *Elite of L.A., Inc. (In re Hamilton)*, 584 B.R. 310, 318-22 (B.A.P. 9th Cir. 2018) (elements of
18 § 523(a)(6) claim).

19 **V. Uber's Proof of Claim Should Be Allowed And Setoff Against Any Judgment (Count X,**
20 **Affirmative Defense 10, Counterclaims VII, IX, X).**

21 Under California law, the right to equitable indemnity arises "where two or more parties are
22 jointly liable on an obligation and one of them makes payment of more than his share." *Res-Care Inc.*
23 *v. Roto-Rooter Servs. Co.*, 753 F. Supp. 2d 970, 986 (N.D. Cal. 2010) (internal citation omitted). The
24 right to contribution can arise whether the payment is made pursuant to a final judgment or pursuant
25 to a settlement where the settlement includes payment for a concurrent tortfeasor's wrongful conduct.
26 *Id.*; *People ex rel. Dep't of Transp. v. Superior Court*, 26 Cal. 3d 744, 747 (1980).

27 There are two components to Uber's equitable indemnity claim. *First*, Uber is entitled to
28 equitable indemnity from Levandowski because it paid \$250 million to settle a lawsuit in which it was
sued for what Levandowski did. As set forth above, all of the allegations in the Waymo lawsuit

1 centered around Levandowski and his misconduct. Uber's only share in the fault was that it failed to
2 discover what Levandowski had done because of Levandowski's lies. Accordingly, a fair allocation
3 would attribute all of the fault to Levandowski, and certainly no more than 10% to Uber.

4 The second component of Uber's claim is a contribution claim based upon the \$9,453,135.87
5 that Uber paid to Google to satisfy the portions of the Award that were joint and several against Ron
6 and Levandowski. (Award, 123.) Ron assigned his contribution claim to Uber. By definition,
7 Levandowski was a joint tortfeasor as to the joint and several portions of the Award. (See Award, 101,
8 106, 112-13, 120-21, 123.) Because Uber paid that entire amount, and extinguished liability that
9 applied to Levandowski, Uber is entitled to contribution from Levandowski for his share of that
10 payment. See *Res-Care*, 753 F. Supp. 2d at 986.

11 The Arbitration Panel ruled that, as between Levandowski and Ron, "Levandowski's conduct
12 occurred over a period of time three times longer than Ron's," and that much of the arbitration was
13 focused on Levandowski's disloyalty with respect to Tyto, of which Ron was not a part. (Award, 120.)
14 Further, Levandowski was the key wrongdoer here. Accordingly, Uber submits that Levandowski
15 should be held liable for the full Award, but in any event, at least 80%, or \$7,562,509.

16 Accordingly, Uber's proof of claim should be allowed in the amount of \$232,562,509.00 and
17 held to be non-dischargeable under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6).

18 CONCLUSION

19 For the foregoing reasons and based on the facts Uber will prove at trial, Uber is entitled to
20 judgment in its favor on all of Levandowski's claims and all of Uber's counterclaims and defenses.

21 Dated: January 24, 2022

PACHULSKI STANG ZIEHL & JONES LLP

22 By /s/ Debra I. Grassgreen
23 Debra I. Grassgreen
24 Miriam Manning
25 --and--
26 JENNER & BLOCK LLP
27 David J. Bradford
28 Terri L. Mascherin
Catherine Steege
Katharine R. McLaughlin

Counsel for Uber Technologies, Inc.

1 STATE OF CALIFORNIA)
2 CITY OF SAN FRANCISCO)

3 I, Oliver Carpio, am employed in the city of San Francisco, State of California. I am over the
4 age of 18 and not a party to the within action; my business address is One Market Plaza, Spear
Tower, 40th Floor, Suite 4000, San Francisco, California 94105.

5 On January 24, 2022, I caused to be served the following documents in the manner stated
6 below:

7 • **UBER TECHNOLOGIES, INC.'S TRIAL BRIEF**



9 (BY EMAIL) On, I caused the above-described document(s) to be sent by e-mail to the
parties identified below at the e-mail addresses listed.

Attorneys for Google LLC	Attorneys for Anthony S. Levandowski
MUNGER, TOLLES & OLSON LLP Thomas B. Walper (thomas.walper@mto.com) John W. Berry (john.berry@mto.com) Alexander S. Gorin (alex.gorin@mto.com)	KELLER BENVENUTTI KIM LLP Tobias S. Keller (tkeller@kbkllp.com) Dara L. Silveira (dsilveira@kbkllp.com)
KEKER, VAN NEST & PETERS LLC Rachael E. Meny (rmeny@keker.com) Thomas E. Gorman (tgorman@keker.com) Reid P. Mullen (rmullen@keker.com)	GOODWIN PROCTER LLP Brett Schuman (bschuman@goodwinlaw.com) Rachel M. Walsh (rwalsh@goodwinlaw.com) Andrew Ong (aong@goodwinlaw.com)

19 I declare under penalty of perjury, under the laws of the State of California and the United
20 States of America that the foregoing is true and correct.

21 Executed on January 24, 2022 at San Francisco, California

22
23 /s/ Oliver Carpio
24 Legal Assistant
25
26
27
28